Liberty Victoria - Victorian Council for Civil Liberties Inc

Submission to the US FTA Task Force
Office of Trade Negotiations
Department of Foreign Affairs and Trade

Inquiry into the proposed Australia-United States Free Trade Agreement

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1. Introduction

1.1 Liberty Victoria - The Victorian Council for Civil Liberties Inc is an independent non-government organisation which traces its history back to the first Australian civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law.

1.2 We welcome this opportunity to comment on the proposed Australia-United States Free Trade Agreement. Liberty Victoria presented an earlier submission on trade during the Joint Standing Committee on Treaties inquiry into Australia's relationship with the WTO, and has taken part in ongoing NGO consultations with both Treasury in relation to the OECD Guidelines on Multi-national Enterprises, and with DFAT over international trade issues. Liberty does not oppose free trade per se, however, we believe, as stated in our earlier submission, that trade does not operate in a vacuum but that trade agreements ought to be seen as an elaboration of the economic provisions in the international human rights agreements, not a repudiation of them. As such Liberty supports the call for the inclusion of human rights clauses in trade agreements. We note that under the recent Trade Promotion

Authority given to President Bush in 2001 that the US cannot negotiate trade agreements with other countries unless such agreements have as their principal negotiating objectives the *promotion* of the fundamental core labour standards of the ILO, and provisions relating to environmental protections. Liberty welcomes the inclusion of these objectives in the proposed AUSFTA (TPA is discussed later in this submission).

1.3 Liberty fully supports the trade framework established by the United Nations High Commissioner for Human Rights which sets out the relationship between human rights and trade. As Australia is a signatory to the major international human rights instruments we believe that this guideline should be considered by any Australian government undertaking trade negotiations with other countries. This guideline states that a proper balance between economic and human interests:

(a) sets the promotion and protection of human rights among the objectives of trade liberalization;
(b) examines the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;
(c) emphasizes the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as primary duty bearer for the implementation of human rights;
(d) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
(e) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights; and

(f) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[1]

1.4 Further to Liberty's human rights concerns, we write this submission on the basis that the proposed AUSFTA will use the North American Free Trade Agreement (NAFTA) agreement as its template, as was recently done with the Singapore-Australia Free Trade Agreement (SAFTA). The NAFTA agreement raises a number of legal concerns that Liberty wishes to address. First, the investor-state provisions under NAFTA, which are included in SAFTA, have raised considerable controversy in the US, Canada and Mexico. These provisions allow private investors to directly challenge host-governments. We believe that such provisions need to be narrowly defined and a clear distinction between expropriation and government regulation needs to be included in any proposed trade agreement. The expropriation claims filed to date against Canada, all relating to environmental and health regulations, have been estimated at totaling more than US$1billion dollars. Australia needs to avoid the possibility of such excessive claims over public interest legislation.

1.5 Secondly, we have concerns regarding the dispute settlement processes. Under NAFTA the dispute settlement bodies consist of the International Centre for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, and the United Nations Centre for International Trade Law (UNCITCRAL), the rules and procedure of which all derive from a commercial arbitral model. They are ad hoc tribunals without the fundamental principles of transparency in procedure or open hearings, they do not have to notify the public in the event of registration of a claim, nor is their any public interests requirements as found in domestic administrative law. These may not be pertinent issues when two international

[1]United Nations – Economic and Social Council, 'Economic, Social and Cultural Rights: Liberalisation of Trade in Services and Human Rights', Report of the High Commissioner, Commission on Human

private actors are in arbitration over commercial matters, however, when one party is a state party, which is essentially a representative of a collectivity, of the people, "the policy goals of the state become implicated in the dispute"[2]. Therefore, we believe that it is imperative that any dispute resolution process follow the principles underlying our domestic courts, the process must be open, transparent and accountable, and given the nature of the disputes as illustrated by NAFTA, amicus briefs from persons or sectors, whether industry, agricultural, human rights or labour, whose rights or interests may be affected must be allowed. A further issue which concerns Liberty is the relationship between a private ad hoc dispute settlement mechanism and Australia's domestic courts, developing jurisprudence under NAFTA suggests the potential for conflict between the two legal systems (discussed below).

1.6 This submission will be set out in the following way: the first part will cover legal issues such as expropriation, dispute settlement, and issues relating to the *Bipartisan Trade Promotion Authority Act* 2001. This Act sets the legal requirements and principal negotiating objectives that the US must include in trade agreements with other countries. The second part of the submission will cover human rights issues, principally Australia's obligations under international human rights instruments, the International Labour Organisation Conventions (ILO) and environmental instruments.

2. Part 1 – Legal Issues

2.1 Expropriation, principally its broad definition and impact on regulatory autonomy has become a key and controversial issue within the NAFTA countries. All three signatory countries to NAFTA are re-examining the expropriation provisions, with

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Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth Session, E/CN.4/Sub.2/2002/9 25 June 2002

[2] M Sornararajah (1990) *International Commercial Arbitration* Longman Singapore Publishers p5

the Canadian Government recently recommending that the NAFTA type investor-state provisions should be excluded from the proposed free trade agreement of the Americas[3]. The problem with the provisions relating to expropriation lie in its imprecise terminology and hence broad definition of expropriation. NAFTA's Article 1110 states that "no party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory", this is a standard and acceptable definition of expropriation pertaining to compensation where a regulation deprives land or the investment of all economically beneficial use. However, Article 1110 also includes "measures *tantamount to* expropriation" or "*indirect*" appropriation, neither of which are defined nor is there any elucidation as to what *tantamount to* or *indirect* means in other provisions of the Agreement.

2.2 The few cases that have occurred under NAFTA indicate that the interpretation of expropriation and hence the compensation paid is far broader than that found under the domestic laws of the US, Canada and Mexico and is thus likely to be also broader than that found under cases involving s51(xxxi) of the Australian Constitution. This means effectively that foreign investors would be placed in a far more advantageous situation than domestic investors seeking a remedy in the event of expropriation under Australian law. It also means that measures *tantamount to* or *indirect* may involve public interest legislation such as health or safety, environmental, or industrial laws which may affect some part of the investment or property and thereby be construed as a form of indirect expropriation. This may bring about a situation where the Australian public is liable to pay compensation to a foreign investor for the implementation of public-interest legislation rather than a foreign investor complying with legislation deemed to fall within public-interest categories or implemented as a result of Australia's obligations as signatory to international human rights instruments.

[3] See the Government of Canada, 'Government Response to the Report of the Standing Committee on Foreign Affairs and International Trade: Strengthening Canada's Economic Links with the Americas', (2002) Recommendation 21, page 18.

2.3 In addition, to the problematic nature of expropriation, "measure" is also defined very broadly as including "any law, regulation, procedure, requirement or practice". Vicki Been, Professor of Law at New York University, and Joel C Beauvais, Postdoctoral Research Fellow, Center for Environmental and Land Use Law at New York University, have recently pointed out that the definition of measure as interpreted by the dispute Tribunal has included "not only legislative and administrative actions, but court decisions as well"[4]. They state that the US Supreme Court has rejected the argument that a judicial decision could ever constitute a taking, one can apply to a court to determine whether a government action constitutes expropriation and in the event that the court rules in favour of the complainant seek compensation. However, it has never been accepted in any jurisdiction that should that court rule against the complainant that that judicial decision in itself constitutes a form of expropriation. Nonetheless, the *obiter dicta* in two NAFTA cases suggest that the judiciary in signatory states can be held to expropriate property under the investor-state dispute process[5].

2.4 In *Azinian v Mexico,* a Mexican corporation with US shareholders sought compensation for expropriation for a decision to cancel the corporation's contract for collection and treatment of solid waste. The Tribunal found no expropriation but in the *dicta* suggested that NAFTA Tribunals "can question whether a national court's decision effected "a denial of justice or a pretence of form to achieve an internationally unlawful end", they did not define "a pretence of form" but indicated that it would have to be shown "that the national court's finding "was so insubstantial, or so bereft of a basis in law, that the judgments were in affect

[4] Vicki Been & Joel Beauvais, *The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine',* (2002) Working Paper#CLB-02-06, New York University Center for Law and Business, http://papers.ssrn.com/abstract=337480 - to be published in the April 2003 edition of the New York University Law Review

[5] ibid p 49

arbitrary or malicious," they could not prevail"[6]. Whilst this is only *dicta,* it points to a potentially serious problem, that of an ad hoc Tribunal placing itself in a position to judge a court implemented under a constitution of a national state and subject to the rule of law.

2.5 Likewise in *Loewen Group Inc v United States,* Loewen alleged that in a prior Mississippi civil trial - in which emotional and punitive damages of $500 million were entered against Loewen by a jury verdict – it had received different treatment in the judicial process than an American defendant would have received. Loewen alleged, that the Judge allowed the plaintiff's attorney to appeal to "anti-Canadian, racial and class biases" in violation of the national treatment rules in NAFTA Article 1102. Loewen claimed that continued reference to the foreign status of the company amounted to a denial of justice and inequitable treatment. The US government argued in response, that comments by a private lawyer in a private contract dispute did not constitute a government "measure" in order to bring it within the ambit of the NAFTA rules. Loewen is the first case under NAFTA to directly challenge a jury decision or to challenge the judicial system as constituting a "measure" tantamount to expropriation. In an interim decision in 2001, the NAFTA Tribunal rejected the US argument that private contract litigation did not constitute a "measure" under the NAFTA rules. Should such a development be permitted under a trade agreement, it means that a non-tenured ad hoc Tribunal whose procedures are not open to the public, are non-transparent and non-accountable, would have appellate jurisdiction over domestic courts. This would be an absurd proposition in direct conflict with the principles of the rule of law. Decisions by courts should not be reviewable by essentially secretive and unaccountable Tribunals. Adding further concern regarding the judiciary and/or judicial decisions, an explanatory report for Congress by Baucus, from the Congressional Committee on Finance states that trade barriers and distortions or

[6] ibid pp49-50

non-tariff trading barriers "consist of informal policies and practices that may not be as easy to identify as a written law that violates an international trade agreement. Further, this objective is directed at barriers regardless of the branch of government in which they occur (e.g. executive, legislative, or *judicial*)[7]" [emphasis added]. Does this mean that a judicial decision may possibly be construed as a non-tariff trading barrier?

2.6 The problems with trade dispute tribunals is illustrated in the summary by Been and Beauvais:

> The decision-makers in disputes involving NAFTA's investor protections are not independent judges, insulated by life tenure from political pressures and insulated by prohibitions on conflict of interest from the pressures generated by friendships, reputational interests and the need for future employment. Further, arbitrators chosen by the parties do not necessarily have either the background or the training to balance investor rights, or the importance of free trade, against environmental or land use protections, or about broader concerns about public welfare: Indeed, some assert that the international law and trade-oriented focus of those who tend to serve as arbitrators mean that the panels apply their own version of the "precautionary principle:" if in doubt, trade wins out.

Alongside independence and accountability, this summary also points to need for precise language and definitions, Tribunals should not second guess or define their own understanding of what constitutes the public interest, or where trade ends and public interest begins, these things need to be spelled out within the agreement.

2.7 Furthermore, legal academics in the US have pointed to constitutional problems in relation to Article III of the US Constitution and trade agreements, in particular with NAFTA. Article III of the US Constitution is essentially the same as Chapter III of the Australian Constitution. Boyers argues that there is a spillover jurisprudence problem whereby Article III judges/courts "continue to adjudicate claims against non-NAFTA exporters (and those NAFTA exporters who do not

[7] Baucus, (2002) *Bipartisan Trade Promotion Authority Act of 2002,* Calendar No 319, 107th Congress,

elect panel review) while non-Article III panels assess similar claims under NAFTA … Article III judges will serve as panelists …[and] Article III judges … will be issuing advisory opinions on statutory amendments"[8]. According to Boyer the key issues resolve around "whether a given forum is exercising "the judicial Power of the United States" and therefore must possess attributes of life tenure, non-diminishable compensation, … or whether it's merely carrying out congressional power"[9]. There is concern here about potential conflicts of interest. When faced with similar problems the European Court of Justice struck out a similar dispute resolution process between the EC and the European Free Trade Area (EFTA). They held the process invalid on three grounds:

> [T]he substantial overlap in subject matter jurisdiction between the existing court system and the proposed new court would create confusion, the ECJ did not agree with having its own judges "serve two masters"; and the ECJ objected to granting advisory opinions to EFTA courts because it would change the nature of the ECJ. These threats to the ECJ justified rejecting the proposed dispute resolution system[10].

According to Boyers these problems would also arise under NAFTA. If AUSFTA is based on NAFTA, the same legal or constitutional issues may also arise. In addition, in the context of Australia and its trading partners, how will the balance be struck between AUSFTA exporters and other exporters from the Asia-Pacific region who must exercise their rights through national courts? The Australian government and the negotiators in DFAT need to be aware of the legal issues that have arisen in response to NAFTA. NAFTA is unique amongst bi-lateral trade agreements as it is the first to allow foreign investors to directly sue host governments, prior to NAFTA, foreign investors were required to go through their

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Report, Senate, 2d Session, p 8

[8] James A Boyers 'Globalization and the United States Constitution: How Much Can It Accommodate? *Indiana Journal of Global Legal Studies* (1998) Vol 5: 583, p589, see also Steve Louthan (2001) 'A Brave New *Lochner* Era? The Constitutionality of NAFTA Chapter 11, *Vanderbuilt Journal of Transnational Law,* Vol 34:1443

[9] ibid p 589

[10] ibid p 588

own national governments. As a result it has opened up a new dimension in trade agreements that cover legal issues, regulatory and autonomy issues.

2.8 Trade Promotion Authority (TPA) granted to President Bush in 2001, states in S2(3)(H) that in relation to foreign investment, the dispute panel process must ensure "the fullest measure of transparency…. to the extent consistent with the need to protect information that is classified or business confidential, by" -

(i) ensuring that all requests for dispute settlement are promptly made public;

(ii) ensuring that-

(I) all proceedings, submissions, findings, and decisions are promptly made public;

(II) all hearings are open to the public; and

(iii) establishing a mechanism for acceptance of amicus curiae submissions from businesses, unions, and nongovernmental organizations.

The US government has recognized that trade impacts on non-trade areas, and as such the dispute settlement process cannot be held behind closed doors such as the WTO dispute process. The Baucus Congressional Report states that "since investor-state dispute settlement generally will involve measures taken by a government ostensibly to enhance the welfare of the general public, there often will be interest in a case from an array of different perspectives". For example:

> [S]everal cases to date under NAFTA Chapter 11 involve environmental laws and regulations. The public nature of the measures at issue in these disputes distinguishes them from arbitration between private parties [see para 1.5, p 3]. Because the resolution of these disputes may affect broader public policy, interested parties should have the opportunity to provide input into the formulation of government positions, consistent with pleadings schedules determined by arbitral tribunals[11].

[11] supra, n 7, p 13

Thus the procedure required under TPA is a vast improvement on earlier dispute settlement models involving international agreements and overcomes the fiction that trade issues and broader social issues are unrelated. Liberty's understanding of TPA is that the US government is unable to negotiate trade agreements without fulfilling the conditions or negotiating objectives set out in TPA, which means that compliance with s2(3)(H) is mandatory. We support these provisions and trust that the problems outlined above with the current dispute process under NAFTA will not be repeated under the proposed AUSFTA. Liberty also suggests that in addition to the requirements under S2(3)(H) that the government or trade negotiators examine the dispute settlement process under the Jordan agreement which includes a Memorandum of Understanding on Transparency in Dispute Settlement. That Memorandum requires the US and Jordan to commit to "solicit and consider the views of members of their respective publics in order upon a broad range of perspectives"[12].

2.9 As mentioned above, regulatory autonomy has also become a controversial issue under NAFTA. According to Ganguly, the most serious challenge to the power of a government to regulate in the public interest, be it in the area of public health, environment or labour, is the ability of an investor to bypass host country courts and have the law of a NAFTA type agreement applied to the claim[13]. The expansive expropriation provisions allow direct challenge to government regulations, one need only look to the subject matter of NAFTA cases to see the broad sweep of regulatory measures that could get caught within the definition, a regulation banning a fuel additive MMT[14], a government emergency order preventing the export of PCB wastes from Canada. [15] An order that according to Kurtz, "was by no means discriminatory on its face as it was a blanket ban on all

[12] ibid p13
[13] samrat Ganguly (1999) 'The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health' *Columbia Journal of Transnational Law* Vol 38:113
[14] *Re:Ethyl and the Government of Canada,* Award on Jurisdiction (24 June ILM 708 (1999)
[15] *Re:S D Myers, Inc and the Government of Canada* http://www.naftalaw.org

PCB exports (whether by domestic participants or foreign investors) out of Canada"[16]. The expansive definition and inclusion of indirect expropriation is of recent origin. For example, in the *Amoco International Finance Corporation* award, the Tribunal stated that expropriation amounted to "a compulsory transfer of a property right", and nationalisation as the 'transfer of an economic activity from private ownership to public ownership"[17]. Historically, under international law, a government regulation which may have a negative impact on an investment was not compensable without physical invasion or seizure[18]. One of the most extensive examples of international commercial arbitration over expropriation are the cases deriving from the Iran-United States Claims Tribunal, which resulted from the renationalisation of many industries after the overthrow of the Shah and the installation of the Ayatollah Khomeini Islamic regime. In *Sea-Land Service, Inc,* in relation to an expropriation claim, the Tribunal said:

> A finding of expropriation would require, at the very least, that a Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land[19].

Likewise:

> In the Partial Award in *Eastman Kodak Company,* Chamber Three held that 1) the freezing of all Rangiran's bank accounts by order of the General Public Prosecutor (which had an immediate effect on the management of that company), 2) the appointment of a temporary manager of that company, and 3) the vesting of special power in Rangiran's workers' council to supervise the activity of Rangiran jointly with its management, constituted neither a kind of control for the finding of expropriation of Eastman Kodak shareholders' rights in Rangiran nor enough for a finding of deprivation of Eastman Kodak's ownership rights[20].

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[16] Jurgen Kurtz, (2002) *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment,* Jean Monnet Working Paper, New York University School of Law (now a lecturer at Melbourne University)

[17] Allahyar Mouri (Iran-US Claims Tribunal) (1994) *The International Law of Expropriation as Reflected in the Work of the Iran-US Claims Tribunal,* Martinus Nijhoff Publishers, p 67

[18] supra n 10, p 136

[19] ibid, p 97

[20] ibid, p 139

2.1.1 Banks, referring to the Iran Tribunal cases, states that the Tribunal only found that "compensation was owed in cases where Iran unilaterally took possession or ownership of an enterprise"[21]. One can deduce from the above statements that under the traditional interpretation of expropriation government bona fide regulatory measures pertaining to health, the environment or industrial relations matters could not constitute a measure or any form of deprivation for the purposes of expropriation. By contrast the interpretation developing under NAFTA indicates that much public-interest legislation would be caught, in effect it would be a reversal of the "polluter pays" principle and the Australian public may find itself in a situation where it must compensate investors in the event that it wishes them to desist from activity with harmful environmental or health effects. The problem surrounding trade and regulatory autonomy under NAFTA has caused much concern in Canada, - a country with a comparable political and social system to Australia's - thus the "Canadian government has proposed that NAFTA member countries adopt an interpretation of Chapter 11's expropriation provisions, which would exclude "normal regulation" from their reach"[22]. The Australian government needs to examine the concerns being raised under NAFTA type investment provisions before signing onto a trade agreement with the US. Australia, unlike the US, is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), as such it has agreed to *promote, respect* and *fulfil* such obligations as articulated in that Covenant, Australia therefore must find an equitable balance between the interests of foreign investors and the social rights of Australia citizens. Thus Australia must ensure that it retains the right to regulate to fulfil such obligations. Bona fide public interest legislation must be free from challenge under the proposed AUSFTA.

[21] Kevin Banks (1999) 'NAFTA's Article 1110 - Can Regulation be Expropriation?', 5 *NAFTA Law and Business Review,* 499:515
[22] ibid, p 499

2.1.2. Before turning to part II, a note regarding Trade Promotion Authority (TPA). Liberty recognises the fundamental importance of the *Bipartisan Trade Promotion Authority Act* 2001 to gaining an understanding of the conditions under which the Bush Administration can negotiate such agreements and has therefore taken the time to familiarize itself with the provisions of the Act. We will be commenting on TPA in the next section as some of these conditions Liberty argued in favour of in its first submission to the JSCOT Inquiry on Australia's Relationship with the WTO.

3. Part II - Human Rights Considerations

1. ILO Conventions and Workers' Rights

3.1 S2(a) of TPA states that [t]he overall trade negotiating objectives of the United States for agreements subject to the provisions of s3" (which relates to trade agreements authority) are-

> (6) to promote respect for worker rights and the rights of children consistent with [the] core labour standards of the International Labour Organisation (as defined in section 11(2)) and an understanding of the relationship between trade and worker rights; and
>
> (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental [discussed below] and labour laws as an encouragement for trade.

S11 which covers definitions states in subsection (2):

> The term "core labour standards" means -
>
> (A) the right of association;
> (B) the right to organise and bargain collectivity;
> (C) a prohibition on the use of any form of forced or compulsory labour;
> (D) a minimum age for the employment of children; and
> (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In relation to labour standards and dispute settlement, TPA HR 3005, s2(b)(12)(F) states as part of the Principal Negotiating Objectives for All Trade Agreements (WTO, Bilateral and FTAA) that the US :

> "Seek provisions that treat US principal negotiating objectives equally" with other negotiating objectives (ie, treat labour issues equally with foreign investment, intellectual property, etc) "with respect to the ability to resort to dispute settlement under the applicable agreement, the availability of equivalent dispute settlement procedures, and the availability of equivalent remedies".[23]

Essentially, what this means is that labour and the environment, as two of the principal negotiating objectives under TPA, must have the same access to dispute settlement processes as the other principal negotiating objectives, ie, those concerning business and capital. Thus the TPA labour provisions are similar to the provisions in the US-Jordan Free Trade Agreement which includes coverage of labour and the environment in the general dispute settlement procedures.

3.2 Australia, as a member of the ILO, and a signatory to the core labour standards should have no objection to the inclusion of clauses relating to workers' rights. The first three standards above, (A) (B) and (C), are essentially traditional civil and political rights. As Langille argues that:

> In so far as freedom of association and collective bargaining are specifically labour law matters, they have the advantage of being rights to a process, and not to a substantive outcome. This is a crucial point. The right to freedom of association and collective bargaining is a right to organise and bargain about wages, hours and other terms and conditions of employment. It is not a right to any particular result or standard in these areas[24].

The decisive phrase here is 'right to a process'. The right to freedom of association and collective bargaining are about a right to democratic participation, a right to organise and defend their interests in relation to employment, and a 'right

[23] Mary Jane Bolle, *Trade Promotion Authority (Fast Track): Labor Issues (Including HR 3005 and HR 3019,* CRS Report for Congress, Library of Congress, 7 December 2001
[24] Brian A Languille (1997) 'Eight Ways to think about International Labour Standards' in *Journal of World Trade,* Vol 31, No 4, p 32

to petition for a redress of grievances'. The core labour rights overlap with many of the international human rights instruments. The right to freedom of association and related trade union and employment rights including slave labour and conditions of servitude can be found in Article 4, 20(1), 23 and 24 of the *Universal Declaration of Human Rights,* Article 8 and 22 of the *International Covenant on Civil and Political Rights,* and Article 7 and 8 of the *International Covenant on Economic, Social and Cultural Rights.* The point to be taken from this cross-linkage between ILO conventions and the other international human rights instruments, is that these rights are indivisible. The fact that we commonly refer to some as human rights and others as workers' rights should not challenge their status as fundamental human rights, and irrespective of their legal enforceability or lack thereof, these rights should not be traded away.

3.3 As labour rights have to be included in a free trade agreement with the US, due to TPA, Liberty urges the Government to negotiate in good faith. We advise that labour provisions should not mirror the NAFTA side agreement, which has proven to be disingenuous and ineffectual. We urge the Government to follow the provisions in the US-Jordan Free Trade Agreement which includes labour provisions in the main text. The US-Jordan Free Trade Agreement was signed into force by President Bush on 7 December 2001. The labour provisions of that agreement are as follows:

> **Article 6: Labor**
>
> 1. The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.
>
> 2. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or

otherwise derogate from, such laws as an encouragement for trade with the other Party.

3. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 and shall strive to improve those standards in that light.

4.
(a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

5. The Parties recognize that cooperation between them provides enhanced opportunities to improve labor standards. The Joint Committee established under Article 15 shall, during its regular sessions, consider any such opportunity identified by a Party.

6. For purposes of this Article, "labor laws" means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

(a) the right of association;
(b) the right to organize and bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labor;
(d) a minimum age for the employment of children; and
(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In the Jordan agreement, the parties agreed to enforce their existing labour laws and to settle disputes or disagreements on enforcement of these laws through a dispute

settlement process. We believe that the proposed AUSFTA should be based on the Jordan agreement and not on NAFTA.

4. Environmental Protection

4.1 As with labour rights, TPA stipulates that environmental provisions must be included in trade agreements between the US and other countries. Environmental protection is included amongst the overall trade negotiating objectives of the US. S2(a)(5) states:

> (5) to ensure that trade and environment policies are mutually supportive and seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;
>
> (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental [discussed below] and labour laws as an encouragement for trade.

Under TPA President Bush is required to strengthen the capacity of US trading partners to protect the environment, part of the overall trading objectives is to ensure that trade and environmental policies are mutually supportive. And as pointed out in 3.1 above with regards to labour, protection of environmental standards under TPA HR 3005, s2(b)(12)(F), should have coverage under the dispute settlement process. This is especially so since most of the expropriation claims under the NAFTA agreement have concerned regulations pertaining to environmental issues, such as chemical compounds in petrol, toxic waste dumps, and chemical leakage into water tables, and not as previously discussed, compulsory acquisition of land or property or a rendering of a substantial proportion of the investment economically unviable.

4.2 Once again, Liberty believes that the environmental provisions should not be based on NAFTA but on the Jordan agreement. Under the Jordan agreement, the

US and Jordan agreed to a provision on the effective enforcement of their environmental laws, and to settle disputes on enforcement of such laws through a dispute settlement process. The US and Jordan also established a Joint Forum on Environmental Technical Cooperation for ongoing discussion of environmental priorities, quality and enforcement. The environmental provisions of the US-Jordan agreement are as follows:

Article 5: Environment

1. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.

2. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.

3.
(a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

4. For purposes of this Article, "environmental laws" mean any statutes or regulations of a Party, or provision thereof, the primary purpose of which

is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statutes or regulations, or provision thereof, directly related to worker safety or health.

5. Human Rights and Affordable Healthcare

5.1 The US government has indicated that it wants reform of Australia's Pharmaceutical Benefits Scheme (PBS)[25]. It is clear from the Baucus Report, that such schemes which impose regulatory controls on prices for pharmaceuticals will be considered by the US as a disguised trade barrier[26]. It has been lamented by the US Coalition of Service Industries (CSI) that public ownership of health care and affordable medicines - premised on equitable and universal access - make it difficult for US private sector health care providers to market in foreign countries'[27]. However, unlike Australia, the US is not a party to the international human rights instruments covering economic and social rights. The PBS ensures that low-income individuals, families and pensioners are able to afford basic medicines. In the US a basic prescription costs around $60.00. Australian pharmaceuticals are around 60% lower than the US, and level with price costs in France, Spain and New Zealand[28]. The PBS scheme is consistent with Australia's

[25] Peter Hartcher and Mark Davis, (2002) 'US widens trade push beyond Australia', *Australian Financial Review,* Friday 15 November, p 9
[26] supra, n 7, p20
[27] Kuttner, R (1999) 'The American Health Care System: Wall Street and Health Care', *New England Journal of Medicine, 340: 664-68*
[28] Productivity Commission (2002) *Evaluation of the Pharmaceutical Industry Investment Program,* Draft Research Report.

obligations under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 25 of the UDHR states:

> (1) Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and *medical care* and necessary social services, .. [emphasis added].

Article 12 of the ICESCR states:

> 1. The States Parties to the present Covenant recognise the right of everyone to enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In respect to States obligations and the Right to Health, the UN Committee on Economic, Social and Cultural Rights, in its General Comment, held that:

> States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, asylum seekers and illegal immigrants, to preventative, curative and palliative health services; abstaining from imposing discriminatory practices relating to women's health and needs. Furthermore, obligations to respect [the right to health] include a State's obligation to *refrain from prohibiting or impeding traditional preventative care, healing practices and medicines*, [emphasis added][29].

5.2 The Australian Government, as a signatory to these international human rights treaties, is not only obliged to promote and respect these instruments, it must also *fulfil* its obligations. Liberty urges the Government to ensure that Australia's guarantee of affordable medicine for all, as encapsulated in the pharmaceutical

benefits scheme, not be undermined by trade policy or trade agreements. Australia's medical system and provision for affordable medicine on the basis of need, rather than ability to pay, should not and must not constitute an expropriation requiring compensation under trade rules. Nor should the provision of medicines be used as part of the negotiating process, universal access for all Australians to affordable medicines should not be weakened in exchange for some commercial benefit, Liberty is firmly of the view that the human rights of Australian citizens are non-negotiable.

5.3 The Economic, Social and Cultural Rights, Commission on Human Rights has also looked at the Right to Health under the ICESCR in relation to the trade Related Intellectual Property Rights Agreement (TRIPS) of the WTO and raised a number of concerns. Many of these issues are well known, the most high profile related to access to cheap medicines for HIV AIDS in developing countries. However, affordable medicine is also a concern for developed countries. Australia must retain the right to produce cheap generic medicines for those unable to afford expensive brand name medicines, government authority to issue a compulsory license for patented medicines must remain a viable and legitimate course of action for the Australian government. Such licenses promote the public interest and serve as a necessity in the event of national emergencies[30].

6. Intellectual Property Rights and Human Rights

6.1 There are two issues relating to intellectual property rights that we wish to comment upon. There has been much controversy, particularly in developing countries, over the patenting of indigenous knowledge by multi-national companies. This has already become an issue in parts of Queensland where multi-national companies or 'bio-prospectors" go to Aboriginal communities seeking information

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[29] UN committee on Economic, Social and Cultural Rights, General Comment no 14 – Right to Health, Adopted by the Committee, May 2000, para 34

[30] UN Economic and Social Council, commission on Human Rights, '*The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights,* Report of the High Commissioner, 27 June 2001, E/CN.4/Sub.2/2001/13, p 15

about traditional medicines with a view to patenting the knowledge. Aboriginal culture is based on community values and systems of ownership, thus skills and knowledge that have been used for thousands of years by indigenous communities but not patented by those communities, can be patented by multinational bio-tech firms, depriving those indigenous communities of the use of that knowledge[31]. There is no requirement that 'prior knowledge' or 'prior consent' be recognized. Liberty believes that indigenous communities should not be deprived of the use of such knowledge, we urge the Government to address the issue of traditional systems of knowledge and use of traditional medicines and its conflict with the modern system of intellectual property rights. Some protection is required in the area of traditional knowledge before any company is allowed to patent such products prior consent should be obtained from Aboriginal communities or representative Aboriginal community councils.

6.2 The second, which is an emerging issue, relates to farmers, genetic engineering and food security, and quarantine. Liberty is not commenting on the merits of genetically modified food in itself, but rather concerns surrounding the rights of small primary producers and the rights of corporations in relation to intellectual property ownership. Much of America's agriculture is genetically modified, as such the EU will not accept agricultural products from the US, there is a possibility, if not a probability, that Australia will accept US agriculture under the proposed AUSFTA. The Canadian Case of *Monsanto Canada Inc and Monsanto Company and Percy Schmeiser and Schmeiser Enterprises Ltd,* suggests disturbing developments in relation to a traditional farmers' practice of cultivating, re-using or selling the seeds produced from his/her plants or produce. Percy Schmeiser, had produced canola for more than 50 years, in 1998 his corporation farmed 9 fields in which 1030 acres were devoted to producing canola. Some of that canola contained glyphosate-resistant seeds, seeds containing the gene produced by Monsanto in violation of Monsanto's patent. The court held in favour of Monsanto and that

[31] See Background Briefing, *Bioprospecting in Quennsland,* 27 May 2001, Radio National

Percy Schmeiser had infringed the plaintiff's patent. The decision is now on appeal.

6.3 The problem with this case, and others now emerging, is that it is difficult for farmers to stop their produce being contaminated by genetically modified plants produced on near-by farms. Cross-pollination is a natural process, bees do not distinguish between genetically modified plants and natural plants, thus should a farmer through no action of his/her own find their produce contaminated, they are subject to pay compensation to Monsanto, and from that point forward, they cannot harvest the seed from their own produce without paying an annual fee to Monsanto. In addition, Monsanto then has the right to annually audit their property to ensure that the proper payment for the patent is made. Should a farmer contract to produce genetically modified plants, it is appropriate that he/she comply with the conditions of the contract and use of the patent. However, should he/she not enter a contract with Monsanto or another similar company, and his/her property is contaminated, it is unreasonable that the farmer should be expected to foot the bill and be deprived of the seeds of his/her labour. This is inconsistent with Article 11 of the ICESCR which relates to food security and the right to food, and Article 1(2) which says,.. "that in no case may a people be deprived of its own means of subsistence". Respecting the rights to food means that states should not adopt trade policies that threaten food access or affect a person's means of subsistence[32]. This needs to be addressed in the proposed AUSFTA and through-out the negotiating process. Further, the government should bear in mind the forthcoming results of the appeal of *Monsanto and Scheismer,* as depending on that decision the situation in respect of the rights of farmers in relation to contamination by genetically modified crop may substantially alter.

[32] Lauren Posner, (2001) *Unequal Harvest: Farmers' Voices on International Trade and the Right to Food',* Rights and Democracy, International Centre for Human Rights and Democratic Development

6.4 Australia, being an island economy, has maintained relatively strong quarantine laws. We are very fortunate that we are free of many animal and plant diseases and exotic pests that plague other parts of the world. Robert Zoellick, the US Trade Representative, states that a number of issues of concern to US agriculture would be essential to the conclusion of negotiations. He specifically mentions that "several US agriculture interests have raised serious concerns about Australia's use of sanitary and phytosanitory (SPS) measures as a means for restricting trade"[33]. Zoellick's letter states that SPS measures must be based on science and be fully transparent. We believe that Australia's current quarantine system is scientifically sound and suitable in the Australian island context. Australia's quarantine laws are vital in the protection of animal, plant and human health.

7. Conclusion

In respect of the proposed AUSFTA, Liberty Victoria wishes to be consulted through-out the negotiating period. We have remained a part of the earlier NGO consultations on trade and wish to be included in such a forum over AUSFTA. We also believe, that the public is entitled to see the final text of the proposed AUSFTA before it comes into force. This was not done with SAFTA, no public consultations were undertaken. We note that the US government failed to release documents to the public concerning the US-Chile free trade agreement. As a result of that failure to properly consult with the public, on 9 November 2001 the Center for International Environmental Law, Friends of the Earth and Public Citizen, filed suit under the US *Freedom of Information Act,* against the Office of the United States Trade Representative and Robert B Zoellick, the US trade representative, to make public documents in trade negotiations concerning domestic public health, labour and environmental laws. On 17th December 2002, the United States District Court of Columbia ordered the Bush administration to make the documents public

[33] Robert Zoellick (2002) Letter to Senator Byrd on DFAT's trade website.

by 17 January 2003[34]. We hope that the Australian government is not as remiss as the US government was over the US-Chile free trade agreement. Australia is a representative democracy, as such the people have a right to look at documents, treaties or agreements that the Australian government proposes to sign on their behalf, particularly if such agreements impose binding obligations and the possibility of sanctions against Australia. We look forward to being fully informed on the progress of AUSFTA.

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[34] *Center for International Environmental Law, et al, v Office of the United States Trade Representative, et al,* 17 December 2002, United States District Court for the District of Columbia, Civil Action No 01-2350 (PLF)